Supreme Court, U.S.
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No. 99-1912

IN THE
Supreme Court of the United States

FRITO-LAY, INC.,

Petitioner,

v.

ROBERT HUNTLEY, MICHAEL HILL, RICHARD HENRY, BRENT DOVE, KENNETH REYNOLDS, JACKIE JEWELL, MICHAEL MORRIS, WILLIAM WELCH, BERT BORG, FRED BELLOWS, and SHERMAN PERKINS, on behalf of themselves and others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Washington

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT HAS JURISDICTION TO REVIEW THE WASHINGTON COURT OF APPEALS' DECISION 1

II. RECENT AUTHORITY INDICATES THAT THE CONFLICT OVER SECTION 301 PREEMPTION IS DEEPENING 1

III. THE PETITION DOES NOT INVOLVE AN ARBITRATOR'S POWER TO ADJUDICATE STATE CLAIMS 3

IV. WASHINGTON'S APPROACH TO SECTION 301 PREEMPTION CONFLICTS WITH THIS COURT'S APPROACH 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 4
Atchley v. Heritage Cable Vision Assocs.,
101 F.3d 495 (7th Cir. 1996) 2
Belknap, Inc. v. Hale,
463 U.S. 491 (1983) 1
Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 4
Commodore v. Univ. Mechanical Contractors, Inc.,
839 P.2d 314 (Wash. 1992) 4
Cramer v. Consol. Freightways, Inc.,
209 F.3d 1122 (9th Cir. 2000) 2
Firestone v. Southern California Gas Co.,
2000 WL 986929, 164 L.R.R.M. (BNA) 2897
(9th Cir. July 19, 2000) 2
Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988) 4
Livadas v. Bradshaw,
512 U.S. 107 (1994) 2
Ramirez v. Yosemite Water Co., Inc.,
978 P.2d 2 (Cal. 1999) 3

Statutes

28 U.S.C. § 1257 1
29 U.S.C. § 185(a) 1
Wash. Admin. Code § 296-128-540 3

I. THE COURT HAS JURISDICTION TO REVIEW THE WASHINGTON COURT OF APPEALS' DECISION

Respondents initially challenge this Court's jurisdiction to review the decision of the Washington Court of Appeals. (Opp. at 1) But in doing so, they ignore this Court's decision in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). In *Belknap*, a state trial court held that a state-law claim was preempted by federal labor law, and granted summary judgment. *See id.* at 497. The state appellate court reversed, and the state Supreme Court denied review. *See id.* The employer then sought certiorari.

This Court held that its "jurisdiction to affirm or reverse the [state] Court of Appeals . . . is clear." *Id.* at 497 n.5. Specifically, *Belknap* held that the judgment of the state appellate court was final within the meaning of 28 U.S.C. § 1257 because it "finally disposed of the federal preemption issue" and "to permit the proceedings to go forward without resolving the preemption issue would involve a serious risk of eroding the federal [preemption] policy." *Id.* The procedural posture in this case is identical, and thus, the Court likewise clearly has jurisdiction.

II. RECENT AUTHORITY INDICATES THAT THE CONFLICT OVER SECTION 301 PREEMPTION IS DEEPENING

In its opening submission, Petitioner noted the substantial confusion—and resulting conflicting decisions—over the proper approach to Section 301[1] preemption of so-called "independent" state-law claims, such as the wage claims presented here. (Pet. at 12-15) Even Respondents acknowledge the "confusing" state of the law (Opp. at 5), and

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[1] Labor Management Relations Act, 29 U.S.C. § 185(a)

recent authority—in the very federal judicial circuit encompassing Washington—indicates that this confusion is generating a deepening conflict.

Specifically, in *Firestone v. Southern California Gas Co.*, 2000 WL 986929, 164 L.R.R.M. (BNA) 2897 (9th Cir. July 19, 2000), the Ninth Circuit held that state wage and hour claims for overtime pay were preempted by Section 301. *See* 164 L.R.R.M. at 2899. The *Firestone* Court, like the earlier Seventh Circuit decision in *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 500-01 (7th Cir. 1996) (cited in Pet. at 14), rejected the plaintiffs' argument based on *Livadas v. Bradshaw*, 512 U.S. 107 (1994) and, instead, affirmed the lower court's ruling that the overtime claims were preempted because "resolution of the essential dispute between the parties about the applicability of the [state overtime] exemption"—the virtually identical issue in this case—required interpretation of the collective bargaining agreement. *Firestone*, 164 L.R.R.M. at 2899. This approach by the Seventh and now Ninth Circuits stands in sharp conflict with the approach taken by the Washington courts, which read *Livadas* to mean that the independent legal character of the state overtime claim make Section 301 preemption unwarranted.

A further conflict is reflected by the Ninth Circuit's recent decision in *Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122 (9th Cir. 2000). In *Cramer*, the Court held that torts for privacy invasion and intentional infliction of emotional distress—which depend on the reasonableness of employee expectations about privacy and the relationship between the parties—were preempted since the collective bargaining agreement "inevitably inform[ed]" these subjective determinations. *Id.* at 1127, 1131. But here, in contrast, the Washington court found no preemption, even though the substantive issue—*i.e.*, whether respondents are outside salesmen and thus excluded from Washington overtime requirements—turns on a determination of the parties' intent

regarding the "purpose" of Respondents' jobs. *See* Wash. Admin. Code § 296-128-540; *see also Ramirez v. Yosemite Water Co., Inc.*, 978 P.2d 2, 13 (Cal. 1999) (noting that evaluation of outside sales exemption requires consideration of not only an employee's evidence, but also the "employer's realistic expectations"). Had this issue been presented in federal court in Washington, that court, following *Cramer's* preemption analysis, would have found Washington's subjective "outside salesman" standard to be "inevitably inform[ed]" by the collective bargaining agreement between Petitioner and Respondents' union. *See* 209 F.3d at 1131. But since the parties were in state court, the court below ignored the collective bargaining agreement, and thus Petitioner's evidence of the parties' intent, in its preemption analysis. *See* Pet. App. at 11a.

Certiorari should be granted to review and resolve the conflict over preemption of independent state claims, like the wage claim here, and to clarify the proper preemption approach where resolution of the state claim depends on a determination of the parties' intent.

III. THE PETITION DOES NOT INVOLVE AN ARBITRATOR'S POWER TO ADJUDICATE STATE CLAIMS

Ignoring the conflicting decisions over Section 301 preemption of independent state claims, Respondents' main argument for denying the petition is an exercise in misdirection. Respondents seek to frame the issue as whether an arbitrator can decide state-law claims. (Opp. at 5-6) But this petition poses no such issue. The Section 301 preemption issue is entirely distinct from the arbitrability of Respondents' state-law wage claim. Rather, Section 301 preemption turns on the extent to which resolution of a state claim involves interpretation of a collective bargaining agreement. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 413 (1988). If Respondents' wage claims are preempted under

Section 301, then they are substantively extinguished in favor of the remedies provided in the collective bargaining agreement—including the general grievance and arbitration procedure for challenging classifications, and the special Route-Review Procedure that enables route salesmen to have their routes reviewed and restructured. And contrary to Respondents' assertion (Opp. at 5), protecting the parties' expectations that disputes about job classifications would be resolved through one of these mutually-agreed-to procedures is exactly the policy that Section 301 preemption is designed to protect. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

IV. WASHINGTON'S APPROACH TO SECTION 301 PREEMPTION CONFLICTS WITH THIS COURT'S APPROACH

Finally, Respondents seek to defend Washington's per-se Section 301 preemption test as an accommodation of the state's interest in enforcing its wage and hour laws. (Opp. at 6) And the test certainly does further the state's interest; after all, it allows state claims to escape preemption if plaintiffs can merely *assert* their claim without referencing the collective bargaining agreement. *See Commodore v. Univ. Mechanical Contractors, Inc.*, 839 P.2d 314, 319 (Wash. 1992). But defending the test on this basis proves too much. The flaw with Washington's approach is not that it does not adequately protect Washington's interests, but rather that it conflicts with this Court's decisions indicating the need to balance state interests with the federal policies animating Section 301 preemption. *See, e.g., Lueck*, 471 U.S. at 220; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987). The Washington analysis in *Commodore* and in the decision below allows self-serving plaintiffs to avoid preemption through artful pleading, and allows state courts to ignore obviously relevant evidence in the collective bargaining agreement, as well as the parties' bargaining history, in deciding issues of federal preemption.

Because Washington's approach, as illustrated in the opinion below, plainly deviates from this Court's jurisprudence, review is necessary to clarify the Section 301 preemption test and bring the Washington courts in line with this Court's decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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